

What Constitutes "Doing Business" by Foreign Corporations

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CHANGING CONCEPTS OF WHAT
CONSTITUTES "DOING BUSINESS"
BY FOREIGN CORPORATIONS

STEVEN E. KEANE* AND JOHN R. COLLINS**

I. INTRODUCTION

The authors agree that, in lieu of the title appearing at the head of this article, they might better have chosen a title suggested by Judge Learned Hand in describing the process he went through in attempting to decide a case involving a question of "doing business" by a foreign corporation. Judge Hand stated that it was impossible to establish any rule from the decided cases but rather "we must step from tuft to tuft across the morass."¹ One authority states that the only general statement that can be made with respect to the decisions defining "doing business" or "transacting business" is that the cases are "numerous, varied and inharmonious."² So with these cautionary ideas in mind, we are off across the morass, and hope that we may come safely to the other side, together with you, dear reader.

It is interesting and a trifle surprising in view of the present state of the law to note that as late as 1839 the United States Supreme Court stated that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty."³ Apparently the first attempt to exercise *in personam* jurisdiction over a foreign corporation occurred in New York State in 1835, and this attempt was unsuccessful.⁴ By the middle of the 19th century, however, the various fictions with which we are all familiar were coming into vogue as bases for allowing suit to be brought against a corporation in a jurisdiction other than that of its incorporation. These fictions have been known under various names, such as the "consent" theory, the "presence" theory, (whatever meta-

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¹ *Hutchison v. Chase and Gilbert*, 45 F. 2d 139 (2d Cir. 1930). But then, "Stepping From Tuft to Tuft Across the Morass" would probably not be too informative as the title of a Law Review article.

² 23 AM. JUR. *Foreign Corporations* §361 (1939).

³ *Bank of Augusta v. Earle*, 13 Pet. (U.S.) 519, 588 (1839).

⁴ Note, *Federal Venue and Service and the Foreign Corporation in Diversity Litigation*, 30 IND. L. J. 324 (1955).

physical meaning that word may have with reference to the incorporeal corporation) and the "doing business" theory. Actually what they came down to was that suit could be brought against a foreign corporation either because it had expressly consented to suit by qualifying under state statutes requiring such consent as a condition to qualification, or because it had impliedly consented to suit by "being present" or "doing business" in the state.⁵

II. THE MCGEE CASE, ITS BACKGROUND AND IMPLICATIONS

A. The *McGee* Decision

Just how relevant any of these terms are at the present time is questionable, in view of the decision of the United States Supreme Court, rendered in December, 1957, in the case of *McGee v. The International Life Insurance Company*.⁶ There Mrs. McGee had recovered a default judgment against the insurance company upon a life insurance policy issued to her son. In 1944 the policy had been purchased from a predecessor of the defendant, and in 1948 defendant assumed the insurance obligations of its predecessor and mailed a reinsurance certificate to the son, offering to insure him under the same terms as previously existed. This offer was accepted and premiums were paid by mail from the son's California residence until his death in 1950.⁷

Upon the company's refusal to pay the claim (on the grounds of suicide), Mrs. McGee brought suit against the company in California pursuant to a state statute subjecting foreign corporations to suit in California on insurance contracts with California residents, even though the corporation cannot be served within the borders of the State of California. The only service attempted in the case was the sending by registered mail of a copy of the process to the defendant's principal place of business in Texas.

After securing a default judgment in California, Mrs. McGee filed suit on the judgment in Texas but was refused enforcement of her judgment on the grounds that the judgment was void as violative of the Fourteenth Amendment to the United States Constitution.⁸ Another ground for the Texas court's holding was that the California statute in question was passed in 1949, after defendant and plaintiff's son had entered into the reinsurance contract, and for that reason the statute was in any event not applicable to the present case.⁹

The Supreme Court of the United States reversed the judgment

⁵ Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 CORNELL L. Q. 196 (1958).

⁶ 355 U.S. 220 (1957).

⁷ No real emphasis is given to the fact that the insurance contract was "entered into" in California. But see Chief Justice Warren's language in the very recent case of *Hanson v. Denckla*, 2 L. Ed. 2d. 1283, at 1297, 1298 (June 23, 1958) which seems to indicate this was very important.

⁸ *McGee v. International Life Ins. Co.*, 288 S.W. 2d. 579 (Texas Civ. App. 1956).

⁹ *Ibid.*

of the Texas court on both grounds mentioned.¹⁰ It stated that the statute was merely remedial and procedural and for that reason the time of enactment of the statute could not aid the insurance company. But the point given prime consideration by the United States Supreme Court, and the aspect of the case significant for our purposes, is the square holding that the due-process clause did not preclude the California court from entering a binding judgment against the defendant insurance company.

The Court referred to *International Shoe Co. v. State of Washington*¹¹ as holding that where a defendant is not "physically present" within the territory of the forum, due process requires only that defendant have "certain minimum contacts" with the State so that maintenance of the suit there does not offend "traditional notions of fair play and substantial justice". The Court had previously referred to *Pennoyer v. Neff*,¹² as establishing that the due process clause of the Fourteenth Amendment does place some limitations on the power of State Courts to render binding judgments against persons not served with process within the boundaries of the state. However, after reference to *International Shoe*,¹³ the Court stated:

"Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents."¹⁴

The Court attributed this trend to the transformation of the economy of the United States over the years. It cited the increasing number of transactions involving two or more states, the increasing amount of business conducted by mail across state lines, and the improvements in transportation and communication making it less burdensome for a party defendant to defend in a state where it engages in economic activity.

Probably the language which surprised most people in the *McGee* case was the express statement by the Court that *neither the defendant insurance company nor the previous insurer apparently had ever had any offices or agents in California, and that from the record, apparently the defendant had never solicited or done any insurance business whatsoever in California, except for the particular policy involved in the case.*¹⁵

In fact, the only real limitation that can be read out of the *McGee* case is that the Supreme Court would probably recognize a due process

¹⁰ *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

¹¹ 326 U.S. 310 (1945).

¹² 95 U.S. 714 (1877).

¹³ *Supra* note 11.

¹⁴ *McGee v. The International Life Ins. Co.*, 355 U.S. 220, 2 L. Ed. 2d. 223, at 226 (1957).

¹⁵ 2 L. Ed. 2d. at 225.

violation if the particular contract sued upon did not itself have a connection with a resident of California. The court noted that it is sufficient for due process purposes that the suit was based on a contract which had "substantial connections"¹⁶ with California, and cites as evidence of substantial connection the facts that the contract was delivered in California, the premiums were mailed from there and the insured was a resident of the state at the time of his death.

B. Departure from "Doing Business" Concept in
McGee Case and by State Statutes

Under the *McGee* case, it is probably a fair statement that the term "doing business" has no real significance with respect to the question of whether service on a foreign corporation violates due process requirements. It seems clear a foreign corporation need not be "doing business" in a state in any literal sense of that term in order to be subject to the jurisdiction of the state's courts with respect to transactions having some "substantial connections" with that state. The lie, then, has been given to this "chestnut", just as it was previously shown a foreign corporation could be sued even if it didn't "consent" thereto, and whether it was "present" or not.

This, of course, is not to say that the term "doing business" will not still be used in court decisions. And, of course, it is used by many states in their "service of process" and "qualification" statutes, so that the statutory construction of the term "doing business" will still be a matter for consideration. However, in view of *McGee*, there may well be a reappraisal by state legislatures as to the desirability of the use of the statutory term "doing business". To the extent that it may have been considered in the past by courts and legislatures that due process prevented a corporation from being sued in a state unless it were "doing business" there in some regular and substantial manner, the *McGee* case may well result in less use of this and similar terms in state statutes.

It should be noted, for instance, that the California statute¹⁷ involved in the *McGee* case did not use the term "doing business," but rather made certain acts on the part of insurance companies equivalent to appointment of the insurance commissioner as agent for service of process. Included among such acts are soliciting applications for insurance contracts insuring the lives or persons of California residents physically present in California at the time of issuance or delivery of the policy; insuring property or operations located in California; the issuance or delivery to California residents of such

¹⁶ See 2 L. Ed. 2d at 226. Cf. *Hess v. Pawloske*, 274 U.S. 352 (1927); *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935); *Pennoyer v. Neff*, 95 U.S. 714, 735 (1877).

¹⁷ CAL. INSURANCE CODE §§1610-1620 (1953).

contracts; the collection of premiums thereon; and "any other transaction of business arising out of such contracts".

California is not alone in its departure from the "doing business" terminology, and the departures are not restricted to the field of insurance. In an article in a recent issue of the *American Bar Association Journal*,¹⁸ the author lists Alabama, Arkansas, Florida and New Jersey as among the states with statutes subjecting foreign corporations to jurisdiction if they engage in business activities or have business transactions within the particular states which do not necessarily amount to "doing business" in the traditional sense. California, Colorado and New York are stated to have statutes similar to the Illinois statute providing for service of summons upon any party outside the state and stating that such service is equivalent to personal service within the state if the party served is a citizen or resident of Illinois or has "submitted" to the jurisdiction of the courts of Illinois. The "submission" to jurisdiction by a nonresident is defined as including the "transaction of any business within this state", the commission of a tort in the state, the ownership, use or possession of any realty in the state, and "contracting to insure any person, property or risk located within this state at the time of contracting."¹⁹

Whatever constitutional due process question there may have been with respect to the validity of the last-mentioned factor indicating submission, is pretty well dispelled by the *McGee* case. It is also interesting to note that the author of the ABA article²⁰ indicates that the term "transaction of any business" undoubtedly does not require the traditional "doing business", and, accordingly, a single transaction will probably be deemed sufficient. He also feels that solicitation in Illinois by mail or other advertising, together with the delivery of the product there, would probably support action against a nonresident in Illinois.²¹

C. Background of *McGee* in *International Shoe* and Other Recent Supreme Court Decisions

The real implications of the *McGee* case can probably best be understood in relation to the other United States Supreme Court cases in this general field during the last fifteen years. The *International Shoe* case has been referred to previously,²² and is, of course, the landmark case setting the Supreme Court and all the courts of the

¹⁸ Wham, *An Expanding Concept: Jurisdiction Over Non-Residents*, 44 A.B.A.J. 422, at 423, 424 (1958).

¹⁹ With respect to the Illinois statute, see Professor G. W. Foster's analysis in WISCONSIN BAR BULLETIN (Dec., 1957) at 18.

²⁰ See note 18 *supra*.

²¹ For an excellent article discussing the *McGee* case, see Freeman, *McGee v. International Life Insurance Company and the Amenability of Foreign Corporations to Suit*, THE BUSINESS LAWYER (April, 1958) at 515.

²² *Supra* note 11.

land on the road to direct analysis of the contacts of the corporation with the state, rather than a conceptualistic approach involving a supposed "presence" of the non-physical corporation.

The limitation implicit in the *McGee* case, that jurisdiction based on a single transaction "connected" to the state must be confined to claims arising out of that particular transaction, is expressly discussed in the *International Shoe* case. There, after rejecting the term "presence" as a question-begging word, the Court stated that where there occurs a single or isolated item of activity by the corporation in the state, that is not enough to subject the corporation to suit on causes of action unconnected with that activity. To require a defense based on such unconnected claims was deemed to be too great and unreasonable a burden upon the corporation involved to comport with due process requirements.²³

All that is necessary for jurisdiction, however, is that the activities carried on by the corporation be of such a quality and involve contacts with the state by the corporation so as to make it reasonable to require the corporation to defend there. Among the factors cited by the Supreme Court as important there were that the shoe company had carried on systematic and continuous activities in the State of Washington, had done much business there and had received benefits from the state's laws and the right to use its courts to enforce its claims, and that the obligations sued upon had arisen out of the very activities mentioned.²⁴

Service in that case was made personally upon an agent of the company in the State of Washington, and by registered mail to the company's home office, and the court stated that both of these devices gave "reasonable assurance" that notice would be actual and that such is sufficient to comply with due process requirements.²⁵

Of interest in the *International Shoe* case is the separate opinion of Justice Black, wherein he indicates that he dislikes the majority's references to convenience, fair play and substantial justice, and that he thinks the clear right of a state to open the doors of its courts for its citizens to sue corporations whose agents are present transacting business there, cannot be conditioned upon the ideas of the United States Supreme Court as to natural justice. He also indicates that, in his view, due process does not involve a question of "conveniences", as the majority opinion implies.²⁶ It is interesting to note that Justice Black wrote the unanimous opinion in the *McGee* case²⁷ and there

²³ 326 U.S. at 317.

²⁴ The suit involved an action by the State of Washington to collect unemployment compensation payments relating to the dozen or so agents the company had within the State.

²⁵ 326 U.S. at 320.

²⁶ *Ibid* at 324-325.

²⁷ 355 U.S. 220, 2 L. Ed. 2d 223 (1957).

expressly stated that while "there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract" this would certainly not amount to denial of due process.²⁸

It would appear, then, that any relevance to be given to the "conveniences" of suit in one state as opposed to another is to be considered under doctrines of *forum nonconveniens*. It seems pretty clear that the inconveniences of defending in a particular state are not going to impress the Court if raised in connection with due process arguments directed toward defeating jurisdiction in a particular state. But this is not to say that the conveniences of witnesses and parties will not be considered when an attempt is made to change the place of trial.²⁹

In *Travelers Health Association v. Virginia*,³⁰ further development occurred, for in that case the company's contacts with Virginia were by mail rather than by the actual presence of its agents there, and the only service made was by registered mail on the insurance corporation in Nebraska. The action there was brought by the State of Virginia under its "Blue Sky Laws" to enjoin the company from soliciting orders and selling insurance without a permit.

The Supreme Court, Justice Black writing the five to four majority decision, stated the court's rejection of the narrow "consent" theory and of the "doing business" theory dependent upon common law concepts of place of contracting and place of performance. He stated that what was important were the "consequences" of the contractual obligations in the state where the insured resided, and the "degree of interest" of that state in seeing that such obligations were carried out.³¹ The opinion also referred to prior decisions³² calling unwise, unfair and unjust a rule which would permit policyholders to seek redress only in a distant state where the insurance company was incorporated. The statement is made that due process does not forbid a state to protect its citizens from such injustice.³³

In holding that service by mail alone was adequate, the court cited not only the *International Shoe* case but also *Mullane v. Central Hanover Tr. Co.*,³⁴ where the court held that the minimum notice required on the part of the trustee, to beneficiaries of a common trust fund whose addresses were known, was mailed notice, and that publication

²⁸ 2L. Ed. 2d at 226.

²⁹ For more on this point see Foster, *Personal Jurisdiction Based on Local Causes of Action*, 1956 Wis. L. Rev. 522, at 542, 572, discussing *forum nonconveniens* principles with respect to the significance of the inconveniences of defending in a particular state.

³⁰ 339 U.S. 643 (1950).

³¹ 339 U.S. at 648.

³² *Lumbermen's Ins. Co. v. Meyer*, 197 U.S. 407, 418, 419 (1905); *Mutual Life Ins. Co. v. Spratley*, 172 U.S. 602, 619 (1899); Cf. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

³³ 339 U.S. at 649.

³⁴ 339 U.S. 306 (1950).

was not enough as to such persons. The Court in that case also indicated that personal service was *not* necessary, even though such service would insure actual and personal notice (though lacking in the power of compulsion because made outside the jurisdiction of the particular court.)³⁵

It is noted that in the *Travelers* case the majority opinion was that of only four justices; Justice Douglas concurred in the result but wrote a separate opinion and four justices dissented. It was this split of authority which was referred to by the Texas Court in the state decision³⁶ appealed from in the *McGee* case, as basis for its declining to hold that the service by mail made in the *McGee* case was sufficient for purposes of due process.³⁷ Whatever importance may have been given to the split in the *Travelers* case, however, appears to be no longer significant in view of the unanimous decision in the *McGee* case (with the exception that Chief Justice Warren did not participate in the case.)

Another United States Supreme Court case since *International Shoe* important in connection with the "doing business" discussion, is *Perkins v. Benguet Consolidated Mining Co.*³⁸ There the Court held that the presence of the president of the defendant Phillippine corporation in the State of Ohio, together with the carrying on of the general business of the company in that state during and immediately after World War II, constituted activities sufficient to sustain service made on the president in Ohio even though the cause of action sued upon did not arise out of activities carried on in that state. The court stated that it was clear Federal due process does not compel a state to provide for service on foreign corporations at all, and that, *a fortiori*, a state need not make provision for service broad enough to include jurisdiction as to transitory actions not arising in the state, if it deigns to provide for such service at all.³⁹

Then addressing itself to the question whether due process *prohibits* the exercise of such jurisdiction, the Court stated that it had been squarely held in *International Shoe* that if an authorized representative of a foreign corporation is "physically present in the state" and engaged in activities appropriate to his receiving notice on behalf of the corporation, there is no unfairness in subjecting the corporation to the jurisdiction of the state courts by service upon him, with respect to causes of action arising out of the activities carried on by the corporation within the forum state.⁴⁰ The next step was taken in the

³⁵ *Ibid* at 319.

³⁶ *McGee v. International Life Ins. Co.*, 288 S. W. 2d 579 (Texas Civ. App. 1956).

³⁷ 288 S.W. 2d at 582.

³⁸ 342 U.S. 437 (1952).

³⁹ 342 U.S. at 440.

⁴⁰ 342 U.S. at 445.

Perkins case, the Court holding that under the facts there involved the activities of the corporation were sufficient to authorize service on the corporate official in Ohio even though the cause of action arose out of activities conducted elsewhere.

It is noted, however, that the Supreme Court remanded the case to the Ohio Court because it was not clear whether the Ohio decision was rested upon the mistaken view that due process forbade the sustaining of the service, or on an adequate state ground (that the Ohio statutory requirements had not been complied with).

D. Lower Court Decisions Presaging and Following *McGee*

As examination of the cases analyzed in a pre-*McGee* article⁴¹ will indicate, the *McGee* case does not seem as "unprecedented" a decision when read in the light of such cases as *Zacharakis v. Bunker Hill Mut. Ins. Co.*,⁴² and *Compania De Astral, S. A. v. Boston Metals Co.*⁴³ Those cases sustained personal jurisdiction over foreign corporations in suits involving a contract which was really the only contact the foreign corporation had had with the particular state. It is noted that these two cases, along with several others,⁴⁴ are cited in a footnote in the *McGee* case following the statement that it is sufficient for due process purposes that suit was based on a contract with substantial connections with the state in question.⁴⁵

The *McGee* case has been cited approvingly in several cases already.⁴⁶ It was followed in a patent venue case.⁴⁷ Probably the most significant thing in this case is that it quotes the language from *McGee* stating that the defendant insurance company never had any offices or agents in California, and, so far as the record showed, had never done any insurance business in California except for the particular policy involved. It is this language which is the most striking thing about the *McGee* case, and which will probably be often cited as support for the proposition that only a single contact is necessary to sustain service on a cause of action arising out of that single contact.⁴⁸

⁴¹ Foster, *Personal Jurisdiction Based on Local Causes of Action*, 1956 Wis. L. Rev. 522. This article thoroughly examines cases arising in the State and Federal jurisdictions after *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) and prior to *McGee v. The International Life Ins. Co.*, 355 U.S. 220 (1957).

⁴² 281 App. Div. 487, 120 N.Y.S. 2d 418 (1953).

⁴³ 205 Md. 237, 107 A. 2d 357 (1954).

⁴⁴ *Ace Grain Co. v. American Eagle Fire Ins. Co.*, 95 F. Supp. 784 (S.D.N.Y. 1951); *Storey v. United Ins. Co.*, 64 F. Supp. 896 (E.D.S.C. 1946); *S. Howes Co. v. W. P. Milling Co.*, 277 P. 2d 655 (Okla. Sup. Ct. 1954); *Smythe v. Twin State Improv. Corp.*, 116 Vt. 569, 80 A. 2d 664, 25 ALR 2d 1193 (1951).

⁴⁵ 2 L. Ed. at 226.

⁴⁶ *Miklos v. Liberty Coach Co., Inc.*, 138 A. 2d 762, 766 (N. J. Sup. Ct. 1958); *Askew v. Crouch*, 250 F.2d 584 (2d Cir. 1958); *Brooks v. Nat. Bank of Topeka*, 251 F.2d 37, 42 (8th Cir. 1958).

⁴⁷ *Kerr v. Port Huron Sulphite and Paper Co.*, 157 F. Supp. 685 (D.N.J. 1957).

⁴⁸ Since the formal preparation of this article, the United States Supreme Court,

III. "DOING BUSINESS" TERM—DIFFERENT MEANINGS IN DIFFERENT CONTEXTS

Before going into an examination of the Wisconsin statutes and a few of the more recent cases with respect to "doing business," it is

in a 5 to 4 decision, held that the Florida courts lacked jurisdiction to enter a judgment purporting to extinguish interests in trust assets located outside its borders. It then found the defendant corporate trustee had no office in Florida, and transacted no business there, and none of the trust assets had been held or administered in Florida. Since record disclosed no solicitation of business in that State either in person or by mail, the "minimal contacts" made a prerequisite to personal jurisdiction under *International Shoe*, 326 U.S. 310 (1945), were found not to exist. *Hanson v. Denckla*, 2 L. ed. 2d 1283 (June 23, 1958.) The Courts per Chief Justice Warren distinguished *McGee*, 355 U.S. 220 (1957) by stressing that there the defendant solicited a reinsurance agreement with the offer being accepted in and premium mailed from California, while in the present case the cause of action did not arise out of any act done or transaction consummated in the forum State. Also emphasized was the *absence* of any special legislation by Florida in exercise of its "manifest interest" in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation. The Court here appears to recognize the enactment of CALIFORNIA INSURANCE CODE §§1610-1620 (1953) as being an important factor in the *ratio decidendi* of the *McGee* decision. Cf. *Travelers Health Asso. v. Virginia*, 339 U.S. 643, 647-649 (1950); *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935); *Hess v. Pawloski*, 274 U.S. 352 (1927).

It is also significant in this latest decision of the Supreme Court that the execution in Florida of the powers of appointment under which the beneficiaries and appointees claimed did not give Florida "a substantial connection with the contract on which this suit was based." The Court states, (2 L. ed. 2d at 1298) "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of the rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)."

Of interest in connection with the *McGee* and *Hanson* cases is the following excerpt from the Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions of the Conference of Chief Justices: (U.S. News & World Report, October 3, 1958, p. 96).

"Also, in cases involving the in-personam [against the person] jurisdiction of State courts over nonresidents, the Supreme Court has tended to relax rather than tighten restrictions under the due-process clause upon State action in this field. *International Shoe Co. v. Washington*, 326 U.S. 310, is probably the most significant case in this development.

"In sustaining the jurisdiction of a Washington court to render a judgment in personam against a foreign corporation which carries on some activities within the State of Washington, Chief Justice Stone used the now-familiar phrase that there 'were sufficient contacts or ties with the State of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to enforce the obligation which appellant has incurred there.'

"Formalistic doctrines or dogmas have been replaced by a more flexible and realistic approach, and this trend has been carried forward in subsequent cases leading up to and including *McGee v. International Life Insurance Co.*, 355 U.S. 220, until halted by *Hanson v. Denckla*, 357 U.S. decided June 23, 1958."

The committee submitted this report in connection with the Resolution adopted by the Conference urging the United Supreme Court to "... exercise one of the greatest of all judicial powers—the power of judicial self-restraint. . . ." Chief Justice John E. Martin of the Wisconsin Supreme Court was one of the ten State justices on the Committee.

probably well to note that the term "doing business" may well mean different things in different contexts. The term has been used with respect to questions of amenability to service and jurisdiction, taxation questions, questions arising under "qualifying" or licensing statutes, and venue questions, among other things.⁴⁹

The question whether the "business done" in a state by a foreign corporation is interstate or intrastate is not important with respect to whether the corporation can be sued there.⁵⁰ In other words, the rule appears to be that bringing suit against a corporation in a state where it has even minimal contacts does not have any relation to the burdening of interstate commerce, while taxing or requiring that corporation to qualify in that state may well have such constitutional implications. And Fletcher⁵¹ states that a broader meaning is given to "doing business" in taxation statutes than in qualifying statutes, and that the latter statutes generally give a broader meaning to the term than do service statutes.⁵²

The implications of the *International Shoe*⁵³ case in tax cases will probably be spelled out by the U. S. Supreme Court decisions in *Minnesota v. Northwestern States Portland Cement Co.*,⁵⁴ and *Stockham Valves & Fittings, Inc. v. Williams*.⁵⁵ The Minnesota Supreme Court sustained imposition of the Minnesota income tax on the defendant—Iowa corporation, using language reminiscent of *International Shoe*.⁵⁶ The Georgia Court, however, held imposition of its income tax on the foreign corporation concerned constituted a violation of both the commerce and due process clauses of the U. S. Constitution. As this is written, these cases have not been decided by the U. S. Supreme Court, but the decisions will likely be landmark cases in this field.⁵⁷

⁴⁹ See e.g. 18 FLETCHER, CYCLOPEDIA CORPORATIONS §§8709, 8712 (1955 Rev. Vol.), stating that some courts have said a corporation may be "doing business" for purposes of service of process, and yet not be liable to taxation, licensing or other state regulatory provisions, because the latter would constitute an undue burden on interstate commerce.

⁵⁰ See *International Harvester v. Kentucky*, 234 U.S. 579 (1914).

⁵¹ 18 FLETCHER, CYCLOPEDIA CORPORATIONS §8712, p. 399 (Rev. Vol. 1955).

⁵² For those especially interested in the taxation aspects of the doing business problem, it is well to note that FLETCHER, *ibid*, indicates at §8804.2 that although the *International Shoe* case (326 U.S. 310 (1945)) did not directly relate to taxation, the principles there will probably be extended to tax cases when the occasion arises. This step appears to have been taken by the Vermont Supreme Court in a franchise tax case involving a New York brewery, *Ruppert v. Morrison*, 117 Vt. 83, 85 A.2d 584 (1952). In fact, as noted in *Ruppert*, the *International Shoe* case also dealt with a tax question (unemployment compensation tax), though chief consideration was given to the service question.

⁵³ 326 U.S. 310 (1945).

⁵⁴ 84 N.W.2d 373 (Minn. 1957) *probable jurisdiction noted in* 355 U.S. 911, 2 L. ed. 2d 272 (1958).

⁵⁵ 101 S.E.2d 197 (Ga. 1957), *cert. granted* 78 S. Ct. 670 (March 17, 1958).

⁵⁶ See 84 N.W.2d at 379-380.

⁵⁷ See 17 FLETCHER, CYCLOPEDIA CORPORATIONS §8465 et. seq. (1933) with

As Fletcher⁵⁸ notes, many decisions do not distinguish the concept "doing business" as used in the various contexts mentioned above, and sometimes indiscriminately cite cases involving, for example, "doing business" for service purposes, in connection with questions involving "doing business" for qualification purposes. It would appear that in view of the trend of the recent United States Supreme Court decisions away from use of any symbolic concept, such as "presence" or "doing business", these instances will occur less often and more direct analysis will be required with respect to the particular problem involved.

IV. DEVELOPMENT IN WISCONSIN

The Wisconsin statutes and decisions relating to "doing business" can be divided into three main categories:

A. There are the statutory provisions under Wis. Stats., Chapters 180, 181, and 226 relating to corporations, stock and nonstock, and foreign corporations. These provisions relate to the requirements for qualification and also contain various provisions relative to service of process.

B. Secondly, there are the provisions of Wis. Stats., sections 262.09, .12 and .13 relative to service of process generally; these sections contain provisions which are generally applicable to foreign corporations and which should be considered when dealing with a service problem involving a foreign corporation in Wisconsin.

C. Then there are the provisions of Wis. Stats., sections 200.03 and 201.43 involving services of process with respect to insurance companies.

For ease of reference the above groupings of statutes will be designated "Corporation Law Statutes", "Service Statutes", and "Insurance Statutes", respectively. It should be kept in mind that these titles are somewhat arbitrary, as some statutes in the first category involve service problems, etc. These categories will be discussed in the order mentioned, and relevant cases analyzed after the statutory rules are set forth.

A. Corporation Law Statutes and Decisions Thereunder (Chapters 180, 181 and 226)

Section 180.825⁵⁹ provides that service of process may be made on a registered agent of a foreign corporation, or on the Secretary of State of Wisconsin if a foreign corporation "authorized to transact

respect to "doing business" questions involving the requirement that a foreign corporation "qualify" in a state. It is noted that in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), the United States Supreme Court stated that the activities necessary for the sustaining of jurisdiction are not necessarily the same as those stated in a state statute to be "doing business" sufficient to require the corporation to secure a license in that state.

⁵⁸ *Ibid.*

⁵⁹ WIS. STAT. §180.825 (1957).

business in Wisconsin" has designated no registered agent, or if such agent cannot be found, or if the certificate of authority of the corporation has been revoked. If service is made on the Secretary of State, he is required to mail a copy of the process to the corporation's principal office. The section also provides that service thereunder can be made only in actions arising out of or relating to "any business transacted or property acquired, held or disposed of" within the State of Wisconsin. If the address of the corporation is not readily ascertainable, the Secretary of State may publish rather than send the process by registered mail. The section also indicates that there is no limitation by virtue of the section on the right to serve a foreign corporation in any other manner "now or hereafter permitted by law".

It should be noted that subsection 1 of this section specifically refers to foreign corporations "authorized to transact business" in Wisconsin. Accordingly, it would appear that a corporation which has not qualified (and is, therefore, not "authorized to transact business") but which may nevertheless be "doing business" as the term is used in other Wisconsin service statutes, would have no relation to the above section. Service on such corporation would have to be made under other provisions of law which will be discussed below.

The statute regarding what corporations are required to have a certificate of authority is section 180.801,⁶⁰ which states that a foreign corporation shall procure a certificate of authority before it shall "transact business" or "acquire, hold or dispose of property" in Wisconsin. However, the statute expressly states that no certificate of authority need be procured for loaning money, taking notes, mortgages, etc., if the foreign corporation first files with the Secretary of State a statement constituting that officer as its attorney for service of process in any actions arising out of any business done by the corporation in Wisconsin. The section refers to section 180.825⁶¹ for the manner in which service of process should be made.

In subsection (3) of 180.801, the legislature has specifically set forth a list of activities which do not constitute "transacting business, or acquiring, holding or disposing of property" in Wisconsin, *with respect to the requirement that it procure a certificate of authority*. Among those activities are holding corporate directors' or shareholders' meetings; maintaining bank accounts; maintaining stock transfer offices; and soliciting or procuring orders by mail or through agents or otherwise, where the orders require acceptance outside Wisconsin before becoming binding contracts.

What effect, if any, will be given to the express statement that merely soliciting or procuring orders does not constitute transacting

⁶⁰ WIS. STAT. §180.801 (1957).

⁶¹ *Supra* note 59.

business for purposes of the requirement that a foreign corporation qualify, upon the construction of the term "doing business" as used in Section 262.09,⁶² the general service statute? The indications are that this is of no relevance when a question of amenability to service is being considered.⁶³

Section 180.847⁶⁴ provides the sanctions against a foreign corporation which does transact business or acquire, hold, or dispose of property in Wisconsin without acquiring the required certificate of authority. Prior to the 1951 revision, Section 226.02 (9)⁶⁵ provided that contracts made by unlicensed foreign corporations doing business in Wisconsin affecting the liability of the corporation or relating to property within the state were void on behalf of the foreign corporations, but were enforceable against them. The legislative revision committee deemed this rule unduly harsh, however, and stated it was not an aid to the purpose of the state of collecting fees due from foreign corporations. Accordingly, the present statute merely prohibits such a foreign corporation from using the Wisconsin courts *until* it obtains a certificate of authority, and the validity of contracts made by such corporations is not impaired in any way by their failure to obtain a certificate. There are also provisions relating to penalty fees for corporations failing to acquire certificates of authority when required.

A new provision in 180.847 (4),⁶⁶ similar to the provision for the appointment of the motor vehicle commissioner of the state as attorney for service upon nonresident drivers, provides for service on foreign corporations which transact business without a certificate of authority, by service on the Secretary of State. "Transacting business" or "acquiring, holding or disposing of property" in Wisconsin without the required certificate is expressly stated to constitute the appointment of the Secretary of State as agent for service of process. The statute also provides that its provisions do not in any way limit the right to serve under other provisions of law which may be applicable.

In *Bulova Watch Co. v. Anderson*,⁶⁷ the lower court had sustained a demurrer to the complaint on the basis that section 180.847⁶⁸ prohibited suit by a foreign corporation transacting business in Wisconsin without a certificate of authority and that this prohibition went to the corporation's capacity to sue. The Supreme Court, however, re-

⁶² WIS. STAT. §262.09 (1957).

⁶³ See *Huck v. Chicago, St. Paul, Minn. & O. Ry. Co.*, 4 Wis. 2d 132 (May 6, 1958), discussed below in the body of this article.

⁶⁴ WIS. STAT. §180.847 (1957).

⁶⁵ WIS. STAT. §226.02 (9) (1949).

⁶⁶ *Supra* note 64.

⁶⁷ 270 Wis. 21, 70 N.W.2d 243 (1955).

⁶⁸ *Supra* note 64.

versed on the grounds that it found no transaction of business in Wisconsin by the corporation involved. The court stated that for a corporation to transact business in a state “* * * it must be physically present within the state in the sense of having an officer or agent there who is performing some act on behalf of the corporation.”⁶⁹ It expressly held that acts of the plaintiff Bulova in placing fair trade requirements in the contracts made with its Wisconsin distributors and the “carrying out” in Wisconsin of these terms, did not constitute the transaction of business by Bulova.

Also cited by the Supreme Court in the *Bulova* case, and of interest in connection with this general subject, is Section 180.849,⁷⁰ which provides that the prosecution or defense of an action in Wisconsin courts does not of itself constitute transacting business in Wisconsin.

Other statutes of general interest in this connection are Section 181.66⁷¹ with respect to the “conducting of affairs” by foreign nonstock corporations; Section 226.025⁷² with respect to “doing business” by foreign corporations furnishing “affiliated” public utilities certain services, equipment, facilities, etc., and providing for the appointment of the Secretary of State or designation of a resident agent as attorney for service of process with respect to claims arising out of transactions between the corporations and the public utilities with which they are “affiliated”; Section 226.05,⁷³ providing that the maintenance of deposits in bank accounts by foreign corporations in Wisconsin is not “doing business” or “acquiring, holding or disposing of property” in Wisconsin and should not be considered as a factor in determining whether the corporation is “doing business” in the state, or in determining the situs of the property or income of the corporation for tax purposes. The last statute, by its broad terminology, would seem to have general applicability to any “doing business” questions arising in any context in Wisconsin.

A Wisconsin case typical of many which arose under the previous statute voiding contracts made by unlicensed foreign corporations transacting business in Wisconsin, is *Standard Sewing Equip. Corp. v. Motor Specialty*.⁷⁴ There the Court held the statute in question was not applicable where the transactions involved were all in interstate commerce, since a contrary holding would constitute an undue burden on such commerce by a state. This rule will still have applicability, of course, with respect to contracts entered into prior to

⁶⁹ 270 Wis. at 27, 70 N.W.2d at 247.

⁷⁰ WIS. STAT. §180.849 (1957).

⁷¹ WIS. STAT. §181.66 (1957).

⁷² WIS. STAT. §226.025 (1957).

⁷³ WIS. STAT. §226.05 (1957).

⁷⁴ 263 Wis. 467, 57 N.W.2d 706 (1953).

the 1951 revision of the statute; those contracts are void if the corporation was not licensed but should have been.⁷⁵

B. Service Statutes and Decisions Thereunder

Wisconsin Statutes, Section 262.09⁷⁶ is the general statute applicable to the personal service of summons on corporations. Sub-section (1) provides that the summons may be served on a corporation by delivering a copy thereof within the State of Wisconsin as provided in the section, and that such service shall have the same effect as personal service on a natural person. The methods of service authorized by the section are expressly stated to be in addition to other methods authorized by law. Sub-section (4) of the section provides that a foreign corporation may be served under the provisions of Section 180.825⁷⁷ (i.e., service on the registered agent or the Secretary of State), or "by delivering within or without the state a copy of the summons to any officer, director or managing agent of the corporation." Such service may be made, however, only if the corporation "(a) is doing business in Wisconsin at the time of service, or (b) the cause of action against it arose out of the doing of business in Wisconsin".

Examination of the history of this statute discloses that previously it provided broader bases for service. From prior to the 1898 Statutes through June of 1942, the statute provided (in Section 262.09(13))⁷⁸ that service could be made on foreign corporations by delivering a copy of the summons and complaint to any officer in Wisconsin, or to any agent in charge of or conducting business for the corporation in Wisconsin, or to a trustee of the corporation, (1) if the foreign corporation had property in the state, or (2) if the cause of action arose in Wisconsin, or (3) if the cause of action existed in favor of a Wis-

⁷⁵ In connection with this see 21 THE CORPORATION JOURNAL 123, listing Wisconsin among the states having statutory definitions of what constitutes "doing business" for qualification purposes. The note there indicates that the *Erie v. Tompkins* rule, requiring, in essence, that Federal Courts apply state substantive law in diversity cases, is applied as to "doing business" cases involving qualification so that if the state's statutes bar suit by an unlicensed foreign corporation in a state court the same rule applies in the federal courts. See *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949). See also page 183 in the February-March, 1956 issue of the above periodical which lists six states (Colorado, Florida, South Dakota, Washington, West Virginia and Wisconsin) as having statutes prohibiting foreign corporations from transacting business, or acquiring, holding or disposing of property in a state until they have complied with the state's qualification requirements.

For those especially interested in the problem of "doing business" for qualification purposes, see also Note, 1941 Wis. L. Rev. 380 which analyzes the Wisconsin cases to date with respect to this question. The author concludes that the cases leave the matter questionable and that the best policy for a foreign corporation wishing to insure the enforceability of its contracts with Wisconsin residents is to secure a license to do business in Wisconsin. See also C. T. CORPORATION'S *What Constitutes Doing Business* (1956) for a state-by-state summary of the cases on this question.

⁷⁶ WIS. STAT. §262.09 (1957).

⁷⁷ WIS. STAT. §180.825 (1957).

⁷⁸ WIS. STAT. §262.09 (13) (1941).

consin resident. It also provided that service could be made upon the Secretary of State (4) if, but only if, the cause of action arose out of business transacted in Wisconsin, or if defendant had property therein.

On July 1, 1942, by Wisconsin Supreme Court order, Section 262.09(13) was renumbered Section 262.09(4).⁷⁹ Thereafter, until May 1, 1953, the statute provided for service on any of the persons mentioned in the earlier law, (1) if the corporation had property in Wisconsin, or (2) if the cause of action arose in Wisconsin, or (3) arose out of business transacted in Wisconsin, or (4) if the cause of action was in favor of a resident of Wisconsin.

However, effective May 1, 1953, Section 262.09(4) was repealed and re-created in its present form. The Judicial Council comments at that time indicated that the supposed bases for service relative to having property in the state, and to a claim running in favor of a resident of Wisconsin, were not adequate bases for personal jurisdiction. The Council cited *Pennoyer v. Neff*,⁸⁰ and Am. Jur.,⁸¹ as to the invalidity of the first mentioned basis, and Restatement of Judgments,⁸² and *Consol. Textile Co. v. Gregory*,⁸³ as to the second basis.

It is noted that West's Annotated Wisconsin Statutes, in referring to the above sub-section, indicates that it is to be read in connection with Wis. Stat. §§180.825 and 180.847, which are discussed above. Because of the express language in both of those sections indicating that they do not limit or affect the right to serve under any other laws, it would appear that Section 262.09(4) provides an independent basis for service and that the elements stated in §180.825(1) are not relevant under Section 262.09.

Among the recent Wisconsin cases construing this statute is *Mitchell v. Airline Reservations, Inc.*,⁸⁴ where the entrepreneur of a Milwaukee ticket agency brought suit for conspiracy for breach of contract, and service was attempted by serving the defendant's treasurer in the State of Wisconsin. An order quashing service was entered and the plaintiff appealed from that order. In affirming the lower court's order, the court cited cases holding that the mere physical presence of an officer of a corporation or of its agents or a subsidiary dealing with its merchandise, is not sufficient to establish the corporation's "actual presence here."⁸⁵ Although the court referred to and quoted from the *International Shoe* case, it is noted that it used the term "actual presence" in affirming the lower court's decision that the corporation was not "doing business" sufficient to sustain service.

⁷⁹ WIS. STAT. §262.09 (4) (1951).

⁸⁰ 95 U.S. 714 (1877).

⁸¹ 23 AM. JUR. *Foreign Corporations* §489 (1939).

⁸² RESTATEMENT, JUDGMENTS §30 (1942).

⁸³ 289 U.S. 85 (1933).

⁸⁴ 265 Wis. 313, 61 N.W.2d 496 (1953).

⁸⁵ 265 Wis. at 318.

While the decision certainly appears to be correct on its facts (the treasurer had come into Wisconsin merely to confer as to shortages in remittances for tickets the plaintiff had sold and apparently entered the State at the plaintiff's request), the use of the term "presence" might have been avoided in the interests of a mere precise analysis.

In *Behling v. Wisconsin Hydro Electric Co.*,⁸⁶ the Wisconsin Supreme Court reversed an order of the lower court setting aside service on the interpleaded defendant-supplier of propane gas. The court referred to Section 262.09(4) and its incorporation by reference of Section 180.825, and said that no attempt had been made to serve under the latter statute. The issue presented, then, was whether defendant had been "doing business" in Wisconsin at the time of service. (The issue could just as well, it appears, have been put in terms of whether the cause of action arose out of its doing business in Wisconsin).

Service of the amended summons and complaint had been made on an employee of the interpleaded defendant at La Crosse, Wisconsin, and one month later service of the amended summons and complaint, and of defendant's answer and cross complaint, were made on the president of the interpleaded defendant at its home office in Minnesota. The lower court had held that the first attempted service was not effective because the person served was not an officer, director or managing agent, and that the second service was not effective because the company's activities on the date of service constituted interstate commerce and accordingly the corporation was not doing business in Wisconsin as that term is used in Section 262.09(4).⁸⁷

It would appear that the trial court's second ruling was based upon failure to distinguish between the relevance of interstate commerce considerations in qualification cases and its relative insignificance in service cases. In any event, the Supreme Court⁸⁸ cited *Petition of Northfield Iron Co.*⁸⁹ for the proposition that service could be made upon a foreign corporation whose only activity in addition to soliciting orders in the state was the filling of the orders through interstate commerce.

The Court then summarized the activities of the interpleaded defendant in Wisconsin as involving the maintenance of an agent there who called on Wisconsin customers and prospects, procured financial statements from prospects for forwarding to the interpleaded defendant, and gave technical advice to customers in Wisconsin. The

⁸⁶ 275 Wis. 569, 83 N.W.2d 162 (1957).

⁸⁷ WIS. STAT. §262.09 (4) (1955).

⁸⁸ 275 Wis. at 573.

⁸⁹ 226 Wis. 487, 277 N.W. 168 (1938).

Court also indicates that the contracts in question were made in Wisconsin, it appearing that the interpleaded defendant prepared the contracts, signed them in Minnesota and then mailed them to the customers who signed in Wisconsin. Although this factor is mentioned by the Supreme Court, it is not specified as being a *sine qua non* to sustaining service and is merely referred to in connection with a summary of the other activities of the corporation in Wisconsin.⁹⁰

The holding is that such activities, when added to the continuous solicitation of sales in Wisconsin, constituted "doing business" in Wisconsin under 262.09(4).

With respect to the method of service used, the Court directs its attention to the second service on the corporate officer in Minnesota, and states that personal service on him in Minnesota complied with the Wisconsin statute and "certainly constitutes due process if service by registered mail without the state does."⁹¹ The *International Shoe*⁹² and *Travelers*⁹³ cases are cited in support of the proposition that service by registered mail is sufficient.

A recent case that should be examined is *Prime Mfg. Co. v. Kelly*,⁹⁴ where a Virginia sales corporation's president acted as its agent in Wisconsin, had offices here and had procured several telephone listings in connection with its business. These activities were deemed to amount to enough "more" than the mere maintenance of an office for convenience in soliciting orders, to constitute "doing business" under the service statute.

Also worth noting is *Ludwig v. General Binding Corporation*,⁹⁵ wherein Judge Grubb of the Federal Court for the Eastern District of Wisconsin stated that Section 262.09(4),⁹⁶ as well as rule 4(d)(3,7) of the Federal Rules of Civil Procedure, is broad enough to cover all situations allowable within the confines of due process, citing the *International Shoe*⁹⁷ and *Behling*⁹⁸ cases, discussed above. The Court there held that the defendant corporation was not doing business in Wisconsin where it owned no property there, and made no sales there. It appeared that plaintiff sued on a contract executed in Illinois and requiring that plaintiff perform in Illinois, and the Court stated that the making of this contract did not constitute "doing business" in Wisconsin. The activities apparently relied upon by the plaintiff in an at-

⁹⁰ *Behling v. Wisconsin Hydro Electric Co.*, 275 Wis. 569, 577, 83 N.W. 2d 162 (1957).

⁹¹ 275 Wis. at 577.

⁹² 326 U.S. 310 (1945).

⁹³ 339 U.S. 643 (1950).

⁹⁴ 3 Wis. 2d 156 (1958).

⁹⁵ 21 F.R.D. 178 (1957).

⁹⁶ WIS. STAT. §262.09 (4) (1955).

⁹⁷ 326 U.S. 310 (1945).

⁹⁸ *Behling v. Wisconsin Hydro Electric Co.*, 275 Wis. 569, 83 N.W.2d 162 (1957).

tempt to show the defendant was doing business in Wisconsin for service purposes, constituted the furnishing of advertisements for its wholly-owned subsidiary which did do business in Wisconsin, and the sending of a sales instructor to that subsidiary in Wisconsin for training purposes. These elements were termed too "minor and sporadic" to support service.

The Court did recognize the trend toward requiring less and less for a foreign corporation to be deemed to be "doing business" in a state, and cited *Riverbank Laboratories v. Hardwood Products Corp.*⁹⁹ There Judge Duffy of the Seventh Circuit had held venue improper on the grounds that the defendant was not doing business in Illinois, but the Supreme Court reversed with a half-page *per curiam* decision stating that the Illinois Federal District Court had been correct and that service in Illinois was proper. There it appeared the defendant-Wisconsin corporation had solicited orders in Illinois (the forum state) but that the orders were accepted or rejected in Wisconsin.

But Judge Grubb deemed the activities there involved substantially greater than those involved in the case before him, and accordingly held service insufficient in *Ludwig*.¹⁰⁰ It is not clear what the effect of the *McGee*¹⁰¹ decision might have been if it had been decided prior to the *Ludwig* case, especially in view of Judge Grubb's statement that the Wisconsin and Federal service statutes extend as far as due process will let them. Can it be said the contacts in *McGee* were less "minor and sporadic" than those in *Ludwig*?

But probably the most far-reaching Wisconsin decision in the field is the most recent one, *Huck v. Chicago, St. Paul, Minn. & O. Ry. Co., et al.*¹⁰² That case involved an appeal from an order of the lower court quashing service on the interpleaded defendant, Chicago, Rock Island and Pac. Ry. Co., because it was not "doing business" in Wisconsin at the time service was made on one of its agents in Illinois at its principal office.

The Supreme Court reversed, however, holding that even assuming the only Wisconsin activities carried on by Rock Island were soliciting business here and maintaining an office in Wisconsin to aid in such solicitation, these activities alone constituted "doing business" under the service statute. The Court notes Rock Island has no tracks in Wisconsin. Its Wisconsin activities consisted of maintaining an office in Milwaukee; having a general agent, three traffic representatives, a chief clerk and a secretary in Wisconsin; and soliciting freight and passenger business by requesting agents of railroads operating in Wis-

⁹⁹ 220 F.2d 465 (1955), *rvsd. per curiam* 350 U.S. 1003, 1012 (1956), 326 F.2d 255 (1956).

¹⁰⁰ *Supra* note 95.

¹⁰¹ *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

¹⁰² 4 Wis. 2d 132 (May 6, 1958).

consin to route interstate shipments and passengers over the Rock Island Line outside Wisconsin.

But the broad scope of this decision is best seen by noting the following language of the Court:

"Laying aside for the moment any consideration of constitutional law and past court precedents defining the phrase 'doing business', there is no question but that Rock Island's extensive activities in Wisconsin constitute the carrying on of business in this state. As will be developed later in this opinion, we are satisfied that a holding by this court, that such business activities carried on in Wisconsin constitutes the 'doing of business' within the state within the meaning of Sec. 262.09(4), does not offend either the commerce clause of the United States constitution or the due process requirement of the Fourteenth amendment. This being so, the problem with which we are faced narrows down to whether we should construe the statutory words 'doing business in Wisconsin' liberally from a purely rational and common sense approach, and hold that Rock Island's activities within the state constitute the doing of business here. Counsel for Rock Island strenuously contend that we should not, but should interpret such statutory words in the light of numerous past court decisions which have held that mere solicitation of business moving in interstate commerce by a foreign corporation within a state does not constitute 'doing business' within such state.

"* * *

"We have no hesitancy in holding that the objective of the statute was to give citizens of Wisconsin the right to make use of the courts of this state in instituting causes of action against any foreign corporation, which actually is carrying on business activities within the state, subject only to such limitations as are imposed by the United States constitution. We feel certain that neither the Judicial Council in proposing the changed wording of sec. 262.09(4) nor this court in promulgating the same, had any intention to hamstring such right by adopting into such subsection any definitions of 'doing business' laid down in past court decisions, which definitions contained limitations which mistakenly were assumed to be required by the United States constitution."^{102a}

Although the *McGee*¹⁰³ case is not referred to in the decision, it would seem clear from the language quoted that the Wisconsin Supreme Court considers the present Wisconsin service statute broad enough to cover any cases due process will allow.

The Wisconsin service statutes¹⁰⁴ relative to service by publication are also of interest in this connection, for they provided prior to May 1, 1953 that service by publication could be made on a foreign corporation if it had property in the state or if the cause of action arose

^{102a} 4 Wis. 2d at 135-137.

¹⁰³ *Supra* note 101.

¹⁰⁴ Wis. STAT. §262.12 (1951).

in the state. The invalidity of judgments against foreign corporations having property in the state, insofar as personal relief against the corporation is concerned, was recognized by the Judicial Council in 1952, however, and the statute was changed to its present form which makes clear that such judgments are limited to the claim of the defendant to the property within the state.

See also Section 262.13¹⁰⁵ providing that where service by publication is authorized, delivery of a copy of the summons and complaint to the defendant outside the state may be substituted for publication. It would appear that the term "delivering" as used in Wis. Stat. Sec. 262.09(4) would require service by a process server, and that delivery by the postman pursuant to registered mail would not be sufficient. This seems true because Section 262.13 states delivery shall have the same effect as a completed publication and mailing, and the statutes being *in pari materia*, the term "delivery" in the former would probably also be construed to mean more than delivery incident to mailing. In any event, the prudent practitioner will not rely on delivery by mail under Section 262.09(4) but will insure compliance by having the process served.

C. Insurance Statutes and Attorney General Opinions Thereunder

The Wisconsin Statutes also provide in Chapters 200 and 201 a specific procedure for service on insurance companies. Section 200.03 (15), (16)¹⁰⁶ states that the insurance commissioner is considered the attorney for service of process for all insurance companies admitted to the state, with respect to process served upon companies while licensed in Wisconsin and thereafter while any liabilities are outstanding against the Company in Wisconsin. Service is made in a manner similar to that made upon the Secretary of State.

See also Section 201.41¹⁰⁷ which prevents any insurance company from transacting "insurance business" in Wisconsin without first having paid the license fees and obtaining the license required by law. Section 201.43¹⁰⁸ makes service on the insurance commissioner equivalent to personal service on the company and provides for the forwarding of a copy of the process to insure actual notice to the company. Even if the corporation's license is revoked or it ceases to transact business in Wisconsin, Section 201.43(3) provides that service may be made on the commissioner so long as liability under policies made while transacting business in Wisconsin shall exist.

There are several Attorney General's opinions which are of interest here. In an early opinion¹⁰⁹ the same Travelers Health Association

¹⁰⁵ WIS. STAT. §262.13 (1957).

¹⁰⁶ WIS. STAT. §200.03 (15) (16) (1957).

¹⁰⁷ WIS. STAT. §201.41 (1957).

¹⁰⁸ WIS. STAT. §201.43 (1957).

¹⁰⁹ 4 OP. ATT. GEN. 745 (1915).

which was later involved before the U. S. Supreme Court, aroused the interest of the Wisconsin Insurance Commissioner. He asked how a summons and complaint served upon him with respect to the unlicensed Travelers should be treated, and the Attorney General stated that he should make the same disposition of this process as if the Association were licensed in Wisconsin.

An earlier opinion¹¹⁰ refers to a prior opinion, not cited, holding that the solicitation of insurance by mail by a foreign insurance company's sending letters to Wisconsin residents violates the Wisconsin Statutes if the Company is not licensed in Wisconsin. The opinion states, however, that there is no way to make service in Wisconsin where no agent can be found here, and suggests that a Federal statute directed toward solving this problem would be desirable. The present penalty section for receiving insurance applications or premiums in Wisconsin without authorization, is Section 209.15.¹¹¹

In any event, even with the respect to an insurance company that was not licensed in Wisconsin, the *Travelers Health*¹¹² case before the United States Supreme Court would seem to indicate that the State of Wisconsin would not be powerless to prevent an unlicensed insurance company's using the mails to solicit insurance from Wisconsin residents. Legislation may be in order to cover this point.

V. FEDERAL SERVICE AND VENUE PROBLEMS.

As indicated by the *Ludwig*¹¹³ case the question of whether a corporation is doing business in a state is also important for purposes of Rule 4 (d) (3) and (7) of the Federal Rules of Civil Procedure. Although the rules did not specifically use the term "doing business" they do provide that service may be made on a foreign corporation by delivering a copy of the summons and complaint to an officer, a managing or general agent, or an agent authorized by appointment or by law to receive service for the corporation. Subsection (7) provides that service may also be made in any manner prescribed by any United States statute or any statute of the state where the service is made. Rule 4 (f) states that the territorial limits for service of process are the boundaries of the state where the district court issuing the process sits, and extend beyond those limits when a statute of the United States so provides.

Furthermore, the federal venue statute¹¹⁴ provides that, in diversity cases, venue is properly laid in a district where all the plaintiffs or all the defendants reside and provides¹¹⁵ that a corporation may be sued

¹¹⁰ 3 OP. ATT. GEN. 445 (1914).

¹¹¹ WIS. STAT. §209.15 (1957).

¹¹² 339 U.S. 643 (1950).

¹¹³ *Ludwig v. General Binding Corp.*, 21 F.R.D. 178 (1957).

¹¹⁴ 28 U.S.C. §1391 (a).

¹¹⁵ 28 U.S.C. §1391 (c).

in any judicial district where it is incorporated, licensed to do business, or "is doing business". Such district is expressly stated to be deemed its residence for venue purposes.¹¹⁶

VI. THE FUTURE??

To what extent the *McGee* case will broaden the already liberalized principles as to amenability of a foreign corporation to service of process in a state other than that of its incorporation is at this time still in doubt. The unanimity of the decision in the *McGee* case, together with the previous decisions of lower courts sustaining service on a "single contact" theory, seems clearly to indicate that due process is no bar to suit against the foreign corporation in a state with which it may have had only the contact involved in the particular lawsuit. What real effect the *Hanson* case (a 5 to 4 split decision) will have in halting this trend will no doubt be worked out in later decisions. The impact of all this upon the statutory enactments of the states may well be in line with the prediction of Judge Simon Sobeloff, when he stated,¹¹⁸ after referring to the broad generalizations in terms relating to individuals as well as to corporations set out in *International Shoe*:

"These statements present the possibility of such an expansion of jurisdictional concepts in the future as to predicate jurisdiction upon the doing of any act on account of which it is reasonable for a state to open its courts.

"Everyone concedes, of course, that jurisdiction, grounded upon a single act, must be limited to causes of action arising out of that act. To subject the non-resident individual, or corporation, to a general *in personam* jurisdiction because of such limited contact would be unfair and unreasonable, no matter how adequate the notice."

Mr. Sobeloff makes the further point that the states need not go to the limit of their permissible power, whatever the scope of the *International Shoe* liberalizations might be. He suggests consideration of a state statute providing for a broad personal jurisdiction based upon the carrying out of some regular and sustained business activities within a state, and a supplemental statute providing for a limited personal jurisdiction based upon and restricted to claims arising out of an isolated transaction. He cites the Illinois and North Carolina statutes as examples of this course of action, but notes that the North Carolina Supreme Court recently held its statute did not apply to

¹¹⁶ See Note, *Federal Venue and Service and the Foreign Corporation in Diversity Litigation*, 30 IND. L. J. 324 (1955) for a discussion of the federal venue and service problems arising, and for the statement that although the *International Shoe* case (326 U.S. 310 (1945)) arose in connection with a question of service, recent cases have applied its doctrines with respect to the test of "doing business" under 28 U.S.C. §1391 (c).

¹¹⁷ 355 U.S. 220 (1957).

¹¹⁸ Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 CORNELL L. Q. 196, 207-208 (1957).

the case at bar in *Putnam v. Triangle Publications*¹¹⁹ on the grounds that the defendant did not have that minimum connection with the State necessary, and that to hold otherwise would raise serious questions as to its constitutionality.

It may well be that the next cases in this field will better spell out just what the limitations of due process are as applied to these "single transaction" service statutes.¹²⁰ In any event, because of the decision of the Wisconsin Supreme Court in the *Huck*¹²¹ case, it seems clear that the Wisconsin Court will construe our service statute as broadly as the principles of due process will allow. For this reason, the cases to come from the United States Supreme Court and other Courts as to the limits due process imposes, will be directly relevant to service problems in Wisconsin.

One question not answered by *Huck* is whether service on a foreign corporation in Wisconsin, based upon that corporation's having only the contact with Wisconsin out of which the claim arose, could be sustained under the present statute? *Huck* did not go that far, for there the Court referred to Rock Island's "extensive activities in Wisconsin". Pretty clearly whether such a "one contact" situation would be deemed "doing business" under Section 262.09(4) would be a matter of statutory construction (or, more precisely, of "court-rule construction") only; that due process does not bar jurisdiction based on a single contact was settled by the final arbiter in *McGee*. But it could be argued with reason that the present language ("doing business") would have to be stretched beyond its ordinary meaning to sustain jurisdiction over a foreign corporation having only a single contact with Wisconsin. Probably a change in the language of Section 262.09 (4) would be desirable if the policy is to be to sustain jurisdiction in a single transaction case.

The present state of the law appears to be that due process allows a foreign corporation to be sued in a state, even though the *only* contact the corporation has with that state is the one sued upon. But that contact, *if the only one*, limits the claims that can be sued on there; claims not connected with that contact cannot be sued on there, according to just about everyone's idea of the remaining limits of due process in this field. When there is more than just the single contact, however, it becomes a question of studying all the contacts, and they may be sufficient (*a la Perkins*¹²²) to sustain jurisdiction even as to claims unrelated to the contacts with the particular state.

¹¹⁹ 245 N.C. 432, 96 S.E.2d 445 (1957).

¹²⁰ See *Hanson v. Denckla*, 2 L. ed. 2d 1283 (June 23, 1938) discussed at note 48 above for the United States Supreme Court's emphasis on the absence of such a statute as one basis for its holding.

¹²¹ 4 Wis. 2d 132 (May 6, 1958).

¹²² 342 U.S. 437 (1952).